No. 14-981

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v

UNIVERSITY OF TEXAS AT AUSTIN, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS AND THE SOUTHERN POVERTY LAW CENTER, *ET AL.*, IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. The Leadership conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, religions, and socioeconomic backgrounds. The Leadership Conference works to build an America that is as good as its ideals, and toward this end, supports the use of race as one factor in admissions policies to promote diversity in the nation's colleges and universities. Diversity improves the quality of education for all students and promotes leadership and civic engagement. The success of The Leadership Conference as a multiracial and multiethnic coalition dedicated to common goals illustrates the tangible contribution of diversity to contemporary American society.

The Southern Poverty Law Center (SPLC) is a nonprofit civil rights organization based in

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[1] The parties have consented to the filing of this brief. No party to this case or their counsel authored this brief in whole or in part, and no person other than *amici* and their counsel paid for or made a monetary contribution toward the preparation or submission of this brief.

Montgomery, Alabama. Founded in 1971, SPLC is dedicated to fighting hate and bigotry and to seeking justice for the most vulnerable members of society, including women and persons of color. SPLC represents students of color to ensure equal opportunities in secondary and post-secondary educational institutions.

Additional amici curiae listed in the Appendix represent a broad array of allied organizations that have a common interest in promoting diversity in the nation's colleges and universities.

SUMMARY OF ARGUMENT

In continuing to affirm the longstanding principle that colleges and universities may implement race-conscious admissions programs to achieve the educational benefits of diversity, this Court has repeatedly recognized the critical need for such programs. While in *Grutter* v. *Bollinger*, 539 U.S. 306, 343 (2003), the Court predicted that there may come a time when such programs would no longer be needed—perhaps within 25 years of the Court's ruling (*id.* at 343)—we are a long way from that point.

The educational benefits of diversity go far beyond the classroom, impacting the health and success of our communities and the prospects for individual students in their professional lives. As this Court noted in *Grutter*, "The nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." 539 U.S. at 343 (internal quotation marks omitted).

Unfortunately, there remains a lack of diversity in our classrooms, and a concomitant racial divide in neighborhoods, the work place, and prisons, along with stark differences in economic stability, that affect race relations in this country. We are a society largely separated along racial lines—and the divide is growing, not shrinking.

Indeed, in the last year alone, we have seen an alarming display of racial tension in communities across the country. We have seen death and violence throughout the nation, and witnessed the central role race has played in the recent spate of police shootings of young black men. These confrontations have led to increasing tension between law enforcement and racial minorities. This racial violence and the erosion of trust between police and local communities is occurring against a backdrop of ongoing and increasing racial disparities in American society. This context—the role of race in our nation—is crucial to the Court's consideration of the questions presented in this case.

In Part I, *Amici* review concrete examples of racial divides affecting every facet of American society. There is increasing segregation in housing and education, along with persistent disparities in areas such as educational attainment, income, school discipline, interactions with police, crime, and incarceration. Even for minority students who graduate from college, these disparities persist in employment, income levels, and leadership positions in federal government and business.

Because race is such a defining characteristic, it informs the views and experiences of students entering higher education. Part I thus also examines

the benefits to *all* students of having racial and ethnic diversity on a college campus. Universities provide the first real forum for most students to engage in meaningful cross-racial interactions inside and outside the classroom. Not only does this result in a better education, but it provides exposure to those from different backgrounds and experiences, creating an environment in which racial understanding and coexistence is the norm.

Part II considers the legal framework of this case in light of the significant and ongoing racial divide in our country, which continues to make race-conscious admissions programs essential to the educational mission of colleges and universities. As the Court recognized almost forty years ago, colleges and universities have a compelling interest in attaining the educational benefits of a broadly diverse student body. There is no reason to revisit the Court's precedents on compelling interest in the context of higher education. Indeed, the question is not before the Court because Petitioner has not raised it. This is no different than *Fisher*, in which this Court noted that the issue was not before it. *Fisher* v. *Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013). Accordingly, the Court should reaffirm the precedential relevance of *Grutter*.

Further, the University of Texas (UT) has implemented a holistic admissions process—consistent with, and modeled after, the University of Michigan's admissions program that the Court approved in *Grutter*—which is narrowly tailored to accomplish its compelling interest in attaining the educational benefits of diversity.

ARGUMENT

I. RACIAL DIVERSITY IS CRITICAL IN HIGHER EDUCATION BECAUSE RACE PLAYS AN ENDURING ROLE IN AMERICAN SOCIETY AND INFORMS INDIVIDUAL PERSPECTIVES

Race continues to impact all facets of the lives of individuals in the United States. Concrete examples drawn from data, studies, and reports confirm the existence of racial disparities in virtually every area of American society.

Increasing segregation in housing and public primary and secondary education correlates with persistent racial disparities in academic proficiency, educational attainment, income levels, employment, and positions of leadership in government and business. Racial disparities are also apparent in areas such as school discipline and interactions with police—as highlighted by the Black Lives Matter movement—as well as crime and incarceration. And race has been at the center of the explosion in violence resulting in recent, high profile police killings of African Americans—Michael Brown, Eric Garner, Freddie Gray, John Crawford, Ezell Ford, Dante Parker, Akai Gurley, twelve-year-old Tamir Rice, and Sandra Bland, among others—as well as the mass shooting of African Americans at a black church in Charleston, South Carolina.

Given this context, there are significant societal benefits to having racial and ethnic diversity among a broad range of types of diversity on a college campus. Race, and the existing racial disparities in our communities, help shape individual identity, and

students bring their perspectives into the university community. Universities offer students the opportunity to bridge racial divisions and, likely for the first time, engage in meaningful cross-racial interactions. In the university setting, these positive interactions occur both inside and outside the classroom and continue as students enter the world outside of the Academy.

A. Racial Separation Continues To Pervade Our Society

Racial disparities persist in numerous facets of our society that have a significant impact on the experiences of individual students. These disparities manifest themselves early in an individual's life. They are apparent in housing segregation, as well as increasing segregation in primary and secondary schools. Disparities also exist with respect to household income and employment. These disparities are also reflected in statistics for student enrollment, academic proficiency, and educational attainment. Ultimately, racial disparities are evident in workforce composition, participation in political leadership, and crime and incarceration.

Housing in the United States: Housing segregation persists in the United States, as this Court recently acknowledged when describing the "Fair Housing Act's continuing role in moving the Nation toward a more integrated society." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525–26 (2015). The United States is virtually as segregated today as it was 75 years ago. The average non-Hispanic white person lives in a neighborhood that is 75% white, whereas African Americans typically live

in a community that is only 35% white, which is not significantly different from neighborhood demographics in 1940.[2]

Whites tend to live in areas with low minority representation, which stands in stark contrast to the experiences of other groups. For example, the typical African American lives in a neighborhood that is 45% black, 35% white, 15% Hispanic, and 4% Asian. The typical Hispanic lives in a neighborhood that is 46% Hispanic, 35% white, 11% black, and 7% Asian. The typical Asian lives in a neighborhood that is 22% Asian, 49% white, 9% black, and 19% Hispanic. *Id.* at 3.

Moreover, and perhaps more importantly, "the average black exposure to whites" has held steady since 1940, when the average black metropolitan resident lived in a tract that was 40% white. *Id.* While there has unquestionably been a decline in black-white segregation, some studies indicate that this progress was greatest only in metropolitan areas that already had small (less than 5%) black populations. *Id.* at 5. For areas with black populations of 20% or higher, racial segregation rates have declined still, but significantly less compared to areas that had far fewer African Americans beginning in 1980. *Id.*

Housing in Texas: In the greater Houston and Dallas, Texas areas, the average African American

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[2] John R. Logan and Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, at 2 (2011), http://www.s4.brown.edu/us2010/Data/Report/report2.pdf.

lives in a community that is just short of 40% black. In Fort Worth, the average is about 30%. *Id.* at 9. Hispanic-white segregation has been steady as well, with overall Hispanic segregation at about 50% for nearly 30 years. *Id.* at 10. The level of Hispanic-white isolation in metropolitan areas of Texas is notably high. In Laredo, the average Hispanic lives in an area that is 96% Hispanic; it is 91% for McAllen, 65% for San Antonio, 50% for Houston, and just below 50% for Dallas. *Id.* at 14. In Houston, the average black or Hispanic lives in an area that is nearly 90% black or Hispanic. As a result of this persistent isolation, "[d]iversity is experienced very differently in the daily lives of whites, blacks, Hispanics, and Asians." *Id.* at 2.

Education: In part because of segregation in housing, primary and secondary public schools are becoming increasingly segregated. There is a "clear pattern developing of black and Latino students sharing the same schools."[3]

The percentage of black students in majority white schools increased steadily between 1954 and 1988—from 0% to almost 44%—and then began to decline, down to 23% in 2011. On balance, separate education has declined in the South since *Brown* v. *Bd. of Ed.*, 347 U.S. 483 (1954), but segregation has

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[3] Gary Orfield, Erica Frankberg, et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, at 2 (2014), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf.

been increasing since 1991. *See Brown at 60: Great Progress*, at 10–11. Nationally, the average white student attends a school that is almost 72.5% white, 11.8% Latino, 8.3% black, 3.9% Asian, and 3.5% Native American or multiracial. *Id.* at 12. The average black student attends a school that is 48.8% black, 27.6% white, 3.6% Asian, 17.1% Latino, and 2.9% Native American or multiracial. *Id.* Latino students often attend schools that are 56.8% Latino, 25.1% white, 10.9% black, 4.7% Asian, and 2.5% Native American or Latino. *Id.* The average Asian student attends a school that is 38.9% white, 24.5% Asian, 22.1% Latino, 10.7% black, and 3.8% Native American or multiracial. *Id.* Texas ranks second in the nation in terms of most segregated states for black students. *See id.* at 20.

Although it is established under the Constitution that "separate ... [is] inherently unequal," our nation has largely retained its separateness. *Brown*, 347 U.S. at 495. When school districts make efforts to rezone students into under-performing schools that have high percentages of black or Hispanic students to reduce over-crowding in well-performing schools, parents oppose rezoning or, if they have the means, plan to relocate if their children are rezoned. *See* Kate Taylor, *Manhattan Rezoning Fight Involves a School Called 'Persistently Dangerous,'* New York Times, Oct. 27, 2015 (proposed rezoning would move children to a public elementary school with a student body that is 87% black or Hispanic, in which 84% receive public assistance, and approximately 10% "pass the state reading and math tests"). This is illustrated by national public school enrollment trends. Data between 1968 and 2011 reveal a 28% decline in white enrollment, a 19% increase in black

enrollment, and a 495% increase in Latino enrollment. *Brown at 60: Great Progress*, at 6. In the southern region as a whole, whites represent 45% of enrollment, blacks 24%, Asians 3%, Latinos 25%, and Native Americans and multiracial individuals about 3%. *Id.* at 9. Although desegregation plans led to the integration of many public schools, the trend started to reverse as those plans began to terminate. *Brown at 60: Great Progress*, at 10; *see Bd. of Educ. of Oklahoma City* v. *Dowell*, 498 U.S. 237, 249–51 (1991).

Academic proficiency: These patterns of increasing separation in housing and in education lead to other gaps between segments of our citizenry. Academic achievement in secondary schools is uneven. For example, 33% of white 12th grade students were at or above proficiency in mathematics, as compared to 12% of Hispanics, 12% of American Indians and Alaskan Natives, and 7% of blacks.[4] In reading, the numbers were 47% at or above proficiency for Asians/Pacific Islanders and whites, 26% for American Indians and Alaskan Natives, 23% for Hispanics, and 16% for blacks. *Id.*

School discipline: Studies demonstrate disparities in school discipline, particularly in suspension and expulsion rates. African American students are expelled or suspended from school at a

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[4] *2013 Mathematics and Reading: Grade 12 Assessments*, The Nation's Report Card (2013), http://www.nationsreportcard.gov/reading_math_g12_2013/#/.

rate over three times higher than white students.[5] For example, 5% of white students are suspended compared to 16% of black students. *Id.* While African American students represent 16% of student enrollment, they experience 32% of in-school suspensions, 33% of one-time out-of-school suspensions, and 42% of multiple out-of-school suspensions. *Id.* at 2.

School discipline has significant consequences on education. It is common that when students are disciplined, they lose instruction time that they may have otherwise received.[6] In Texas, 59% of white male students had a discretionary violation compared to 83% of African American males and 74% of Hispanic males.[7] For female students, the

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[5] U.S. Department of Education Office for Civil Rights, Civil Rights Data Collection: Data Snapshot (School Discipline), at 1, (Mar. 21, 2014), http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf.

[6] Dan Losen, *et al.*, *Are We Closing the School Discipline Gap?*, UCLA Civil Rights Project, at 4 (2015) (estimating that public school children in the United States lost 18 million instruction days as a result of school discipline), http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf.

[7] Tony Fabelo, *et al.*, *Breaking Schools' Rules, A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, Justice Center the Council of State Governments, and Public Policy Research Institute, at X, (July 2011), https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf.

numbers showed a similar disparity: 70% for African Americans, 58% for Hispanics, and 37% for white students. *Id.*

Some studies have shown that disciplinary referrals negatively affect student achievement, exacerbating other educational inequalities.[8]

Educational attainment: The gaps in scholastic achievement logically extend to levels of educational attainment. Although more United States citizens are earning bachelor's degrees now than in 1990 (a fact that holds true for all groups), the racial gaps in college completion have grown since 1990. Between whites and blacks, the gap has increased from 13% to 18%. In comparing whites and Hispanics, the gap has grown from 18% to 26%. White bachelor's degree attainment rose from 26 to 41%; black attainment rose from 13% to 22%; Hispanic attainment from 8% to 15%; and Asians/Pacific Islanders rose from 43% to 61%.[9] In computer and mathematical occupations, African Americans represent 8.3% of workforce, 6.3% for Hispanics, and 18.5% for Asians.[10] In the life,

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[8] Losen, *et al.*, *Are We Closing The School Discipline Gap?*, at 31 (highlighting how exclusionary discipline impacts learning environments, student achievement, graduation rates, and rates of juvenile crime in the community).

[9] *Educational Attainment*, National Center for Education Statistics (2015), http://nces.ed.gov/programs/coe/indicator_caa.asp.

[10] The STEM Workforce: An Occupational Overview, Fact Sheet 2014, at 6 (2014), http://dpeaflcio.org/wp-content/uploads/STEM-Workforce-2014.pdf.

physical, and social sciences, black professionals make up 5.6% of the workforce, and in architecture and engineering occupations, black professionals are 5.5% of the workforce. *Id.* Hispanics represented 7.5% of the architecture and engineering field and 7.9% of life, physical, and social scientists. *Id.* at 7.

Income: Income disparities exist for households in the United States, as illustrated by Census Data. For the United States as a whole for years 2007-2011, approximately 26% of African Americans were living below the poverty level, 24% of American Indians, and 23% of Hispanics, as compared to approximately 12% of whites.[11] In Texas, for the same time period, approximately 29% of American Indians, 26% of Hispanics, and 24% of African Americans were living below the poverty level, as compared to 15% of whites.[12] Unfortunately, obtaining a college degree does not remove income disparities. Notably, even when the group disparities in educational attainment are closed on an individual basis, all college graduates of color (black, Asian, and Hispanic) maintain lower median

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[11] Suzanne Macartney, *et al.*, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007-2011*, at 13 (issued Feb. 2013), https://www.census.gov/prod/2013pubs/acsbr11-17.pdf

[12] *Id.* at 14; see also *Poverty Rates for the White Alone Population by State: 2007-2011* and *Poverty Rates for the Black or African American Alone Population by State: 2007-2011*, https://www.census.gov/hhes/www/poverty/publications/Appendix_Tables1-24.pdf.

income and lower family net worth than their equally educated white peers.[13]

Employment: The unemployment rate for African Americans is disproportionately high as well. In 2013, the black unemployment rate was about 13.4%, compared to an overall rate of 7.5%.[14] Even for recent college graduates, the unemployment rate was higher compared to non-black college graduates—12.4% for black recent graduates and 5.6% for the general recent graduate population. *Id.* Black college graduates (including recent graduates) had maintained higher rates of underemployment as well.[15] For black college graduates, the underemployment rate was 41.8% in 2013, compared to 34.6% overall. *Id.* at 5. For black recent graduates, the underemployment rate was 55.9% compared to a 45% underemployment rate for non-black recent college graduates. *Id.*

Law Enforcement: In 2005, African Americans were incarcerated at approximately 5.6 times the

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[13] William R. Emmons & Bryan J. Noeth, *Why Didn't Higher Education Protect Hispanic and Black Wealth?*, at 1, Federal Reserve Bank of St. Louis (2015), https://www.stlouisfed.org/~/media/Publications/In%20the%20Balance/Images/Issue_12/ITB_August_2015.pdf.

[14] Janelle Jones & Jason Schmitt, *A College Degree is No Guarantee*, Center for Economic & Policy Research, at 3, (2014), http://www.cepr.net/documents/black-coll-grads-2014-05.pdf.

[15] Underemployment, here, means having a bachelor's degree for a job which does not require one. Jones & Schmitt, A College Degree is No Guarantee, at 1.

rate of whites.[16] Hispanics were incarcerated at nearly double the rate of whites. *Id.* This means that roughly 2.3% of all African Americans were incarcerated, compared to 0.7% of Hispanics and 0.4% of whites. *Id.* at 4. These statistics remained roughly the same through 2010.[17] In 2014, 6% of all black males between the ages of 30 and 39 were in prison, compared to 2% of Hispanic men and 1% of white men in the same age range.[18]

According to the Federal Bureau of Investigations, race-based violence remains the most prevalent brand of hate crime in the U.S., representing nearly 50% of all single-bias hate crime incidents in 2013.[19]

Recent events involving police use of excessive force have underscored the racial disparities in our

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[16] Marc Mauer and Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, at 3 (2007), http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf.

[17] *See* Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, at 1 (2014) (noting that the proportion for Hispanics rose to 0.8% and whites to 0.45%), http://www.prisonpolicy.org/reports/rates.html.

[18] E. Ann Carson, *Prisoners in 2014, Bureau of Justice Statistics*, at 1 (2015), http://www.bjs.gov/content/pub/pdf/p13.pdf.

[19] Federal Bureau of Investigation, Hate Crime Statistics Report (Dec. 8, 2014), https://www.fbi.gov/news/stories/2014/december/latest-hate-crime-statistics-report-released.

society. For example, the U.S. Department of Justice's report analyzing police and judicial practices in Ferguson, Missouri, found that the local law enforcement actions "impose a disparate impact on African Americans that violates federal law" and "are driven in part by racial bias." U.S. Dep't of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department*, at 62–63 (Mar. 4, 2015); *see also id.* at 2 ("Ferguson's own data establish clear racial disparities that adversely impact African Americans.").

These disparities, which have heavily shaped the trust and relationship between the black community and police, are part of the reason groups such as Black Lives Matter have emerged.[20] Black Lives Matter (BLM) began after a police officer killed an unarmed black teenager, Michael Brown, in Ferguson, Missouri during the summer of 2014.[21]

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[20] *See* Black Lives Matter Website, http://blacklivesmatter.com/; *see also* Matt Ford, *Obama Defends Black Lives Matter*, Notes, The Atlantic (Oct. 22, 2015), http://www.theatlantic.com/notes/2015/10/obama-defends-black-lives-matter/412066/; Conor Friedersdorf, Blue Reforms and Black Lives, The Atlantic (Oct. 27, 2015), http://www.theatlantic.com/politics/archive/2015/10/blue-reforms-black-lives/412573/.

[21] Conor Friedersdorf, *A Tough Weekend for the Black Lives Matter Movement*, The Atlantic (Aug. 10, 2015) (attributing the rise of Black Lives Matter to the killing of Michael Brown), http://www.theatlantic.com/politics/archive/2015/08/a-tough-weekend-for-the-black-lives-matter-movement/400862/; Jonathan Capehart, *Trayvon Martin to "Black Lives Matter,"* Washington Post (Feb. 27, 2015) (attributing the birth of Black Lives Matter to the killings of Michael Brown and Eric Garner,

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Over-incarceration and the use of excessive force are devastating black neighborhoods, families, and lives, and this new generation of activists has begun to demand substantive change.[22]

BLM, while still nascent, has been described as an "increasingly coordinated network of millennial activists" that differs from its civil rights forbearers in part because of its broader political agenda, which includes LGBTQ issues and immigration reform as priorities.[23] Additionally, BLM has a less centralized organizing model, instead relying on a grass-roots structure that does not have an express political personality as its center of gravity. *Id.* It has

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and noting that it stemmed from the killing of Trayvon Martin in 2012, an unarmed black teenager, by a civilian named George Zimmerman), https://www.washingtonpost.com/blogs/post-partisan/wp/2015/02/27/from-trayvon-martin-to-black-lives-matter/.

[22] Emily Von Hoffmann, *How Incarceration Infects a Community*, The Atlantic (Mar. 6, 2015) (describing collateral consequences of mass incarceration), http://www.theatlantic.com/health/archive/2015/03/how-incarceration-infects-a-community/385967/; *see also* Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, The Atlantic (Oct. 2015) (detailing the effects of mass incarceration on black families), http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/.

[23] Gene Demby, *The Birth of a New Civil Rights Movement*, Politico (Dec. 31, 2014), available at http://www.politico.com/magazine/story/2014/12/ferguson-new-civil-rights-movement-113906#ixzz3jJFDhWtx.

confronted several candidates for public office and is bringing issues surrounding law enforcement to the center of national political discourse.[24]

Public office: Disparities persist in leadership positions, including national politics. In the 114th House of Representatives, there were 46 African Americans (approximately 11% of members), 36 Hispanics (8%), 12 Asian Americans (3%), and 2 American Indians (less than 1%).[25] In the Senate, just 6 out of 100 Senators belong to racial or ethnic minority groups, which is an increase from 2001, when there were 3 racial or ethnic minorities.[26] This Court noted that it is necessary for a "path to leadership be visibly open to talented and qualified individuals of every race and ethnicity," highlighting that universities are a "training ground for a large number of our Nation's leaders." *Grutter*, 539 U.S. at 332.

Business: Racial disparities also persist among business executives of American corporations. In 2014, blacks made up only 3% of chief executives in

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[24] Janell Ross, *How Black Lives Matter Moved from a Hashtag to a Real Political Force*, Washington Post (Aug. 19, 2015), available at https://www.washingtonpost.com/news/the-fix/wp/2015/08/19/how-black-lives-matter-moved-from-a-hashtag-to-a-real-political-force/.

[25] *See* House Press Gallery, Demographics (2015), http://pressgallery.house.gov/member-data/demographics.

[26] Jens Manuel Krogstad, *114th Congress is Most Diverse Ever*, Pew Research Center (Jan. 12, 2015), http://www.pewresearch.org/fact-tank/2015/01/12/114th-congress-is-most-diverse-ever/.

the United States.[27] As of March 2015, there were only 4 black CEOs of Fortune 500 companies.[28] In 2013, there were 10 Latino and 10 Asian-American Fortune 500 CEOs.[29]

Corporate boards of directors also are overwhelmingly white and male. In 2012, white men occupied 73.3% of Fortune 500 corporate board seats.[30] Men and women of color represented 13.3% of all corporate board members, despite the proven benefits of diversity in the private sector. To that end, *Forbes* found that more than half of the representatives of companies with more than $10 billion in annual revenue "strongly agreed" with the statement that diversity drives innovation.[31]

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[27] Labor Force Statistics from the Current Population Survey, Bureau of Labor Statistics Report (2014), http://www.bls.gov/cps/cpsaat11.htm.

[28] Jillian Berman, *Soon, Not Even 1 Percent of Fortune 500 Companies Will Have Black CEOs*, Huffington Post (Jan. 29, 2015), http://www.huffingtonpost.com/2015/01/29/black-ceos-fortune-500_n_6572074.html.

[29] Richard L. Zweigenhaft, *Diversity Among CEOs and Corporate Directors: Has the Heyday Come and Gone?* (Aug. 12, 2013), http://www2.ucsc.edu/whorulesamerica/power/diversity_among_ceos.html.

[30] *Missing Pieces: Women and Minorities on Fortune 500 Boards*, Alliance for Board Diversity, at 7 (2012), http://theabd.org/2012_ABD%20Missing_Pieces_Final_8_15_13.pdf.

[31] *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce*, Forbes Insights, at 5 (July 2011),

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Additionally, many studies have found that diverse groups result in better outcomes in solving problems.[32] The Court has recognized that several major U.S. businesses wrote as *amici* in support of the idea that the skills required to thrive in the global marketplace include, and require, "exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330.

Race continues to separate and divide society in housing and education, which impacts higher education, employment, income, economic and political leadership, crime, incarceration, and voting. Higher education is a crucial access point for diverse individuals to come together and share individual experiences and viewpoints that will enrich the academic environment and inform and affect life beyond the university. Race and ethnicity still

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http://images.forbes.com/forbesinsights/StudyPDFs/Innovation_Through_Diversity.pdf.

[32] *See* Lu Hong and Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, Proceedings of the National Academy of Science (2004), http://vserver1.cscs.lsa.umich.edu/~spage/pnas.pdf; *see also* Roy Y.J. Chua, *Innovating at the World's Crossroads: How Multicultural Networks Promote Creativity*, at 6–7 (2011) (a heterogeneous social network leads to exposure to new perspectives, and increased creativity), http://www.hbs.edu/faculty/Publication%20Files/11-085.pdf; Thomas Barta, *et al.*, *Is There a Payoff From Top-Team Diversity?*, McKinsey Quarterly (Apr. 2012) (diverse corporate boards enjoyed higher returns on equity and earnings), http://www.mckinsey.com/insights/organization/is_there_a_payoff_from_top-team_diversity.

matter, even as America aspires to become a colorblind society. *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 327 (1978).

B. Race And Ethnicity Inform Individual Perspectives

Diversity has educational benefits for universities because each student brings a distinct perspective informed in part by his or her race or ethnicity. Race affects how individuals of all backgrounds see and experience the world. "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333. Even in a nation that has elected and reelected its first black president, and can identify numerous examples of successful people of color living lives similar to their white counterparts, race and ethnicity are significant forces in shaping individual identity and outcomes.

Race informs our perspectives in part because race is more than skin color. Race is how history, economics, law, politics, and power have managed to combine to shape groups and the individuals who belong to them. If an individual happens to be born into a particular group history—landing the individual somewhere on a trend line built on the group's past—it is highly possible, probable even, that membership in that group will intimately shape

his or her worldview.[33] By considering race and ethnicity as one factor during the admissions process, universities promote diversity in the classroom, in particular disciplines, and for the campus community as a whole. That diversity "'encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'" *Grutter*, 539 U.S. at 325 (quoting *Bakke*, 438 U.S. at 315).

Indeed, whites, blacks, and Hispanics in the United States view their day-to-day experiences differently. Surveys highlight that African Americans and Hispanics believe their treatment is less fair, from dealings with police to treatment in restaurants and public schools.[34]

Furthermore, race remains a significant factor of its own, distinct from socioeconomic background. Race, by itself, can affect individuals. That is true of Prince Jones, a college student from an upper-middle class background killed by a police officer meant to investigate and track another African American male. *See* Ta-Nehisi Coates, *Between the World and*

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[33] *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. Rev 1, 7 (1994) (defining a race as a group of individuals loosely bound by "historically contingent, socially significant elements" of their ancestry).

[34] *See* Monica Anderson, *Vast Majority of Blacks View the Criminal Justice System as Unfair*, Pew Research Center (Aug. 12, 2014), http://www.pewresearch.org/fact-tank/2014/08/12/vast-majority-of-blacks-view-the-criminal-justice-system-as-unfair/.

Me, at 76–88 (2015). One African American concluded that class could not protect his children from discrimination after he learned of a flagrantly racist incident his son endured.[35] Class does not insulate African American men from how society often views them and, in particular, their blackness. Race affects everyone. One's experience identifying as African American or Hispanic, for instance, likely will inform one's individual consciousness, and it also will shape how other members of our society view, understand, and treat an individual.[36] Students bring these diverse perspectives with them when they enroll in the university.

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[35] *See* Lawrence Otis Graham, *I Taught My Black Kids That Their Elite Upbringing Would Protect Them From Discrimination. I Was Wrong.*, Washington Post (Nov. 6, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/06/i-taught-my-black-kids-that-their-elite-upbringing-would-protect-them-from-discrimination-i-was-wrong/.

[36] *See* Alicia Fedelina Chavez & Florence Guido-DiBrito, Racial and Ethnic Identity and Development, in *New Direction for Adult and Continuing Education*, at 39 (Winter 1999) (stating that race and ethnicity are "critical parts of the overall framework of individual and collective identity," and that for some minorities, race and ethnicity are manifested in conscious ways, whereas race and ethnicity for whites, while present, sometimes develop in unconscious ways), available at http://isites.harvard.edu/fs/docs/icb.topic551690.files/Chavez%20and%20Guido%20Debrito.pdf.

C. Universities With Diverse Student Bodies Can Promote Meaningful Cross-Racial Understanding

Diversity is also important because it facilitates interactions among students who come from separate segments of society. In college, students have the opportunity, often for the first time, to interact meaningfully with fellow students with different backgrounds and perspectives and to exchange ideas shaped by their disparate experiences, including experiences impacted by race. Students on a university campus have the opportunity to "learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." *Bakke*, 438 U.S. at 313 & n. 48 (internal quotation marks omitted). By bringing together students from separate segments of society in a campus setting that offers numerous opportunities for students to interact in small groups, universities fulfill their educational mission and serve an important and unique societal role to bridge disparities.

This Court has recognized that diversity leads to numerous benefits in higher education. "Both 'tradition and experience lend support to the view that the contribution of diversity is substantial.'" *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313). The benefits of diversity in higher education include improving classroom discussion and minimizing racial stereotypes. *Fisher*, 133 S. Ct. at 2418 (student body diversity contributes to "enhanced classroom dialogue and the lessening of racial isolation and stereotypes"); *Grutter*, 539 U.S. at 330 ("'[C]lassroom discussion is livelier, more

spirited, and simply more enlightening and interesting' when the students have the greatest possible variety of backgrounds.'") (citation omitted). Discourse on college campuses is especially enhanced by diversity because the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy* v. *James*, 408 U.S. 169, 180 (1972); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring) ("It is the business of a university to provide that atmosphere which is most conductive to speculation, experiment and creation.") (internal quotation marks omitted); *see also Fisher*, 133 S. Ct. 2411 at 2418.

This Court also has found that diversity in higher education can help prepare students for the workplace. *See Grutter*, 539 U.S. at 331. Students who experience a racially diverse educational environment are better prepared to succeed in a workplace that is "increasingly global" and requires "exposure to widely diverse people, cultures, ideas, and viewpoints" in order to thrive. *Id.* at 330. Several research studies have confirmed that cross-racial interactions can increase an individual's professional competence through fostering openness to opposing points of view, reducing prejudice, enhancing their social self-confidence, and improving their ability to negotiate controversial issues.[37] As a

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[37] *See, e.g.*, Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615, 641 (2008); *see also* Mark E. Engberg, *Educating the Workforce for the 21st Century: A Cross-Disciplinary Analysis of the Impact of the Undergraduate Experience on Students' Development of a Pluralistic*

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student's exposure to cross-racial and cultural exchange increases, the student demonstrates increases in cognitive development, self-confidence, understanding, and tolerance.[38] In a survey of over 6,000 alumni of four major research institutions, researchers discovered that those who reported experiencing "substantial" levels of cross-racial interaction in college demonstrated significantly higher skill development in several areas, including the ability to form creative ideas and solutions compared to those who reported only having "some" or "little" cross-racial interaction.[39]

Orientation, 48 Res. Higher Educ. 283, 310-312 (2007) (finding diversity experiences in college key to achieving students workforce preparation); *cf.* Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751, 757 (2006) (meta-analysis finding that intergroup interaction consistently reduced individuals' prejudice levels); *see also* William G. Bowen and Derek Bok, *The Shape of the River, Long-Term Consequences of Considering Race in College and University Admissions*, 267 Princeton University Press, 1998 (reporting on a survey of over 27,000 students, the authors observed that the extent of racial diversity and racial interaction among students turned out to be among the three most influential factors associated with increased student acceptance of other cultures, participation in community service programs, and growth in other aspects of civic responsibility).

[38] *See* Mitchell J. Chang, *et al.*, *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Ed. 430, 449 (2006), http://www.jstor.org/stable/3838606?seq=1#page_scan_tab_contents.

[39] *See* Jiali Luo & David Jamieson-Drake, *A Retrospective Assessment of the Education Benefits of*

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The Court has similarly recognized that diversity in universities helps to prepare students for citizenship. It is critical for universities to foster such cross-racial exchanges during college because colleges are "educating the young for citizenship." *Tinker* v. *Des Moines Indep. Comm. School Dist.*, 393 U.S. 503, 507 (1969); *Grutter*, 539 U.S. at 331 (reiterating the importance of education to developing and maintaining the nation's cultural heritage). The Court has long recognized that "'the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.'" *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313); *Tinker*, 393 U.S. at 512 (future leaders must be "trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues'"). Interaction with racially diverse peers also has been found to encourage willingness to participate in civic life. Researchers have found a positive relationship between studying in a diverse environment and improved civic engagement. Meaningful interactions between diverse students have increased student appreciation for democracy and solidified commitment to civic activities.[40]

Interactions Across Racial Boundaries, 50 J. Coll. Student Dev. 67, 80 (Jan/Feb 2009).

[40] *See, e.g.*, Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, 81 Rev. Educ. Res. 29, 46-50 (2010); Patricia Gurin, *et al.*, *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. Soc. Issues 17, 24

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These are just a few examples of the ways in which race and ethnicity, in combination with numerous other factors, impact the experience of students during and after higher education. Because race and ethnicity inform individual identity and shape experiences, meaningful cross-racial interaction in a university setting yields benefits that might not occur otherwise, largely because of segregation in housing and elementary and secondary education—and the enduring racial separation in our society.

II. THIS COURT HAS RECOGNIZED A COMPELLING INTEREST IN ATTAINING THE EDUCATIONAL BENEFITS OF DIVERSITY IN HIGHER EDUCATION

As this Court recognized almost forty years ago, universities have a compelling interest in attaining the educational benefits of a broadly diverse student body. The ongoing racial separation in our country, which affects the experiences and perspectives of individuals of different races, continues to make race-conscious admissions programs essential to the educational mission of colleges and universities.

There is thus no reason to revisit the Court's precedents on compelling interest in the context of higher education. *See Schuette* v. *Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1630 (2014) (Kennedy, J., plurality) ("In *Fisher*, the Court

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(2004); *see also* Bowen & Bok 257 (noting that the black students surveyed, especially men, "subsequently participated at a higher rate than their white classmates in community and civic undertakings," were "much more likely than whites to hold leadership positions in civic and community organizations.").

did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met."). Furthermore, the Court took *Bakke*, *Grutter*, and *Gratz* "as given for purposes of deciding this case." *Fisher*, 133 S. Ct. at 2417. UT has asserted a compelling interest in attaining the educational benefits of broad student body diversity. To attain the educational benefits of student body diversity, UT considers an individual's race as one factor in a holistic review to evaluate applicants who are not automatically admitted under the Top 10% Law (1997 Tex. Gen. Laws 155 (HB 588)).

A. Universities May Consider Race In Admissions To Further Their Compelling Interest In Attaining The Educational Benefits Of Diversity

In *Fisher*, the Court reaffirmed its prior precedents recognizing a compelling interest "in the educational benefits that flow from a diverse student body ... that could justify the consideration of race" in university admissions. 133 S. Ct. at 2417. The Court observed that a diverse student body "serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes." *Id.* at 1248. These benefits are especially important because, as this Court has recognized, "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation." *Texas Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525. As discussed in Part I, this struggle continues today and has taken on renewed importance in light of the explosion of racial

violence in African American communities in cities from Ferguson, Missouri to Baltimore, Maryland.

The compelling interest stems from Justice Powell's decision in *Bakke*, 438 U.S. 265, approving a university's use of race to further its interest in the educational benefits that flow from a diverse student body. Attaining a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education." *Id.* at 311–12. Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312. He also recognized the "substantial" contribution of diversity. *Id.* at 313 ("[T]radition and experience lend support to the view that the contribution of diversity is substantial."). In fact, nothing less than "the nation's future depends upon leaders trained" in a diverse environment. *Id.* (internal quotation marks omitted).

The Court endorsed Justice Powell's recognition that universities have a compelling interest in attaining the benefits of student body diversity and considered the use of race in the context of higher education in 2003. *Grutter*, 539 U.S. at 325. In *Grutter*, a white applicant alleged that the University of Michigan law school discriminated against her on the basis of race in violation of the Fourteenth Amendment when it rejected her application. In reaffirming the core concept from *Bakke*, the Court held that obtaining the benefits of "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 325.

In so holding, the Court recognized the longstanding deference given to universities to exercise their expertise in deciding whether attaining the educational benefits of diversity is central to the university's mission. *Grutter*, 539 U.S. at 328 (a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer"); *see also Fisher*, 133 S. Ct. at 2419 ("some, but not complete, judicial deference is proper"). Deference is appropriate because such "complex educational judgments ... [lie] primarily within the expertise of the university." *Grutter*, 539 U.S. at 328. This is fully consistent with the Court's recognition in other cases that the Court exercises "special caution" when dealing with "delicate issues concerning the academic community." *Healy*, 408 U.S. at 171.

Universities thus "occupy a special niche in our constitutional tradition ... given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment." *Grutter*, 539 U.S. at 329 (citations omitted). These principles of freedom of speech and thought and "educational autonomy" based in the First Amendment safeguard a university's "'freedom ... to make its own judgments as to education includ[ing] the selection of its student body.'" *Id.* at 329 (quoting *Bakke*, 438 U.S. at 312); *id.* at 387 (Kennedy, J., dissenting) (noting that "the use of race in university admissions" in *Bakke* "reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission."). A university is uniquely situated to advance its educational mission by invoking the "'right to select those

students who will contribute the most to the robust exchange of ideas.'" *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313). Attaining the educational benefits of diversity is "of paramount importance to the fulfillment of its mission." *Bakke*, 438 U.S. at 313; *see also Grutter*, 539 U.S. at 329. It is "at the heart of the Law School's proper institutional mission." *Grutter*, 539 U.S. at 329.

B. There Is No Reason To Revisit The Court's Prior Precedents Recognizing This Compelling Interest

In this case, Petitioner does not challenge *Grutter*'s recognition of a university's compelling interest in the educational benefits of diversity. *See Fisher*, 133 S. Ct. at 2419 ("the parties here do not ask the Court to revisit ... *Grutter*'s holding" approving a compelling interest in diversity); *see also id.* at 2442 (Scalia, J., concurring) ("The petitioner in this case did not ask us to overrule *Grutter*'s holding that a 'compelling interest' in the educational benefits of diversity can justify racial preferences in university admissions.") (citing oral argument transcript). The Court took *Bakke*, *Grutter*, and *Gratz* "as given for purposes of deciding this case." *Fisher*, 133 S. Ct. at 2417. Nothing has changed since the Court's prior decision in this case. Petitioner has not asked the Court to overturn *Grutter*. Nor does Petitioner ask the Court to overturn its longstanding recognition of a university's compelling interest in attaining the educational benefits that flow from student body diversity.

Instead, Petitioner claims that UT's "rationale ... lacks the requisite clarity" necessary for judicial

review. Pet. Br. 25. This red herring cannot stand. As Respondents have repeatedly stated during this litigation, UT seeks to achieve student body diversity through its holistic review of students to complement the Top 10% Law. *See* Resp. Br. 2, 25. UT has clearly invoked the same interest recognized as compelling in *Bakke* and *Grutter*. In exercising its educational autonomy, UT concluded that attaining the educational benefits of diversity requires the consideration of race in admissions for those students that are not automatically admitted under the Top 10% Law.

Just like the admissions program approved in *Grutter*, UT's holistic review includes consideration of an individual's race as one factor, along with a variety of other factors, in deciding whether to admit or reject a particular applicant. UT seeks broad, multifaceted diversity that includes a "far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Resp. Br. 8–9. UT's admissions process, which measures diversity in all its dimensions, thus protects the dignity of individual applicants. *See Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (Kennedy, J., concurring in part and concurring in the judgment) (reducing "an individual to an assigned racial identity" demeans his dignity). UT's admissions process does not reduce individuals to their race, even as it recognizes that race can affect one's perspective. Petitioner fundamentally misconceives the type of diversity to which UT aspires by reducing racial diversity to numbers. *See* Pet. Br. 5, 6, 9, 10, 46. UT aims to achieve the educational benefits of a diverse student body,

including improved learning, cross-racial understanding, classroom discussions, workforce preparation, civic participation, and leadership in public and private life. *See* Univ. of Tex. at Austin, *Proposal to Consider Race & Ethnicity in Admissions* 24 (2004). The lower courts appropriately credited UT's conclusion "'based on its experience and expertise,' that a diverse student body would serve its educational goals." *Fisher*, 133 S. Ct. at 2419.

III. UT'S CONSIDERATION OF AN INDIVIDUAL APPLICANT'S RACE IN ITS HOLISTIC ADMISSIONS PROCESS IS NARROWLY TAILORED TO ACHIEVE THE EDUCATIONAL BENEFITS OF DIVERSITY

This Court remanded the case for consideration whether UT's plan is narrowly tailored to the compelling interest to achieve the "benefits of a student body diversity that 'encompasses a ... broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'" *Fisher*, 133 S. Ct. at 2421 (quoting *Bakke*, 438 U.S. at 315). UT has implemented a holistic admissions process—consistent with the University of Michigan's admissions program that the Court approved in *Grutter*—which is narrowly tailored to accomplish its compelling interest in attaining the educational benefits of diversity. Narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339.

A. UT Conducts A Holistic And Individualized Admissions Process That Operates Like The Process In *Grutter*

The Court held in *Grutter* that a university may consider race as a "plus in a particular applicant's file," so long as the university remains "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 315, 317). In so doing, the university ensures that "each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Grutter*, 539 U.S. at 337. "The importance of this individualized consideration ... is paramount." *Id.*

UT's holistic review is exactly the sort of "individualized consideration" that the Court approved in *Grutter*. Before adopting its current program, UT conducted a year-long review of whether the educational benefits of diversity were being achieved by its race-neutral admissions process. Citing the Court's decisions in *Grutter* and *Bakke*, UT sought diversity that "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but single thorough important element." Resp. Br. 8 (citations omitted). UT found that its attempt to increase diversity during seven years of race-neutral admissions was not successful. *See id.* at 9. UT thus set out to conform its admissions process to the Court's decision in *Grutter*.

Students applying to UT who graduated in the top 10% of a Texas high school class are automatically admitted. Generally, 75% of UT students gain admission this way. Starting in 2005, any applicant who was not automatically admitted under the Top 10% Law is reviewed under UT's holistic process that takes into account a student's academic profile ("Academic Index") and what is known as a Personal Achievement Score (PAS) based on an individualized consideration of six factors, one of which is "special circumstances." Resp. Br. 9–10. The "special circumstances" factor is broken down into seven attributes, one of which is race, but also includes an applicant's background, school, and neighborhood. *Id.* at 33. No individual PAS factor is given any numerical value or is determinative. UT's holistic process reviews applications from out-of-state students and students from Texas high schools who did not graduate in the top 10% (or who attended a school that did not rank graduates).

UT is a highly selective public university with thousands more applications each year than it can enroll in the freshman class. For example, in 2013, UT received over 38,000 applications for around 8,000 spots. About 10,000 students were automatically admitted under the Top 10% Law, and UT extended offers to 5,000 other students admitted through its holistic review process.[41] Competition for admission to UT was especially tough the year Abigail Fisher applied. In 2008, 29,501 students

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[41] *See* http://news.utexas.edu/2013/03/08/decision-time-becoming-a-longhorn

applied for admission to UT.[42] That year, 81% of all freshmen, and 92% of all Texas residents admitted as freshmen, were admitted through the Top 10% channel. Resp. Br. 47.

Petitioner claims that UT's holistic admissions process is amorphous and vague. *See, e.g.*, Pet. Br. 26–27, 29. However, UT's admissions policy does exactly what this Court required in *Grutter*. Like the Michigan program in *Grutter*, UT's admissions process considers race "flexibly as a plus factor in the context of individualized consideration of each and every applicant" who is not automatically admitted under the Top 10% Law. *Grutter*, 539 U.S. at 337 (internal quotations and citation omitted). Race is not given a guaranteed number of points and is not a quota. Instead, UT's admissions process "flexibly considers race only as a 'factor of a factor of a factor of a factor' in the calculus." *Fisher*, 133 S. Ct. at 2434 (Ginsburg, J., dissenting) (internal quotation marks omitted). UT's holistic admissions policy thus functions in the same way as the Michigan program. It "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Grutter*, 539 U.S. at 337. There is no policy or practice "of automatic acceptance or rejection based on any single 'soft' variable." *Id.*

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[42] Univ. of Texas, Common Data Set 2008-2009, https://www.utexas.edu/sites/default/files/files/IMA_PUB_CDS_2008_AY.pdf.

B. UT's Prior Race-Neutral Admissions Policy Did Not Achieve Educational Benefits Of Diversity That Are Critical To UT's Mission

Petitioner argues that UT's admissions policy is not narrowly tailored because it can attain sufficient diversity through a race-neutral program. *See* Pet. Br. 22, 24, 38, 47. Contrary to Petitioner's argument, UT concluded that its prior race-neutral admissions policy, which was in place for seven years, did not achieve the educational benefits of diversity.

UT previously implemented a race-neutral admissions policy after the U.S. Court of Appeals for the Fifth Circuit invalidated UT's prior consideration of race in undergraduate admissions in *Hopwood* v. *Texas*, 78 F.3d 932 (1996). Unlike UT's current program, the admissions process invalidated by *Hopwood* often considered race as a "controlling factor in admissions." Pet. Br. 5.

After *Hopwood*, UT followed a race-neutral admissions policy for seven years. During that time, diversity plummeted despite numerous race-neutral efforts to achieve diversity. In 1997, the state legislature enacted the Top 10% Law to increase the admission of underrepresented minorities because the law automatically admits the top 10% of graduates from Texas high schools. Outside of students automatically admitted under the Top 10% Law, UT considered a wide range of race-neutral factors in admissions, including socioeconomic factors. UT bolstered its recruitment budget and launched promotional campaigns aimed at minority applicants from traditionally underrepresented backgrounds. UT also created scholarship programs

aimed at recruiting highly-qualified students of all races from lower socioeconomic backgrounds. Despite these efforts to achieve diversity without considering an applicant's race, UT experienced an immediate and obvious decline in enrollment among underrepresented minorities. For example, enrollment of African American students dropped by almost 40% between 1995 and 1997 to less than 3% of the class. *See* Resp. Br. 6.

Petitioner argues in particular that Texas's Top 10% Law is a race-neutral alternative. Petitioner claims that the Top 10% Law has succeeded in attaining "real diversity" at UT and that consideration of race is not required to attain the educational benefits of diversity. Pet. Br. 2. Petitioner's argument runs afoul of this Court's conclusion in *Grutter* that percentage plans alone "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340. The Court in *Grutter* stated that a percentage plan alone is insufficient to attain the educational benefits of student body diversity.

Respondents in addition explain that Petitioner is incorrect as a factual matter about the diversity achieved through the Top 10% Law. *See* Resp. Br. 7–8. Under the Top 10% Law, the top ten percent of ranked students in Texas high schools are automatically admitted to UT. But admissions under the Top 10% Law are based on only one factor—class rank at a Texas high school. Given the increased segregation in housing and education and

the disparities in academic proficiency and income, the Top 10% Law does not result in the educational benefits of broad diversity that UT seeks. *See* Resp. Br. 6–8. Because of this, UT concluded after a year-long study initiated after *Grutter* that considering race in a holistic approach was necessary to achieve the educational benefits of diversity.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

LIST OF ADDITIONAL *AMICI CURIAE*

American-Arab Anti-Discrimination Committee (ADC)

The American-Arab Anti-Discrimination Committee (ADC) is the country's largest Arab American civil rights organization. As a non profit grassroots organization, ADC is bipartisan and secular. Founded in 1980 by United States Senator James Abourezk, ADC consists of members from all 50 states and has multiple chapters nationwide, including California. ADC has been at the forefront of protecting the Arab-American community for over thirty-five years against discrimination, racism, and stereotyping. ADC seeks to preserve and defend the rights of all groups whose Constitutional rights are violated in the United States.

American Association of Colleges for Teacher Education (AACTE)

The American Association of Colleges for Teacher Education (AACTE) is a national alliance of educator preparation programs dedicated to high-quality, evidence-based preparation that assures educators are profession ready as they enter our nation's schools. AACTE's over 840 member institutions represent public and private colleges and universities in every state, the District of Columbia, the Virgin Islands, Puerto Rico, and Guam. AACTE leads the field in transforming educator preparation by promoting effective practices and innovations and building capacity in programs that are preparing tomorrow's teachers and leaders. AACTE and its

members recognize the necessity of working to ensure access to higher education as a key part of efforts to further diversify our educator workforce. Equal opportunity in education, including post-secondary education, supports these efforts.

Andrew Goodman Foundation

The Andrew Goodman Foundation supports efforts to ensure the inclusion of diverse and underserved populations in the student bodies of our colleges and universities. Inclusion of minorities in higher education is necessary to build a more peaceful, just and sustainable society.

Chicago Lawyers' Committee for Civil Rights Under Law, Inc.

The Chicago Lawyers' Committee is the public interest law consortium of Chicago's leading law firms. The Chicago Lawyers' Committee was established in 1969 to provide quality legal counsel to those clients whose civil rights cases and projects would benefit the community at large. The mission of the Chicago Lawyers' Committee is to promote and protect civil rights, particularly the civil rights of poor, minority, and disadvantaged people in the social, economic, and political systems of our nation. The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. is the only full service civil rights organization in the Chicago area. The preservation of affirmative action programs is a crucial interest of the Chicago Lawyers' Committee, as part of its work in advancing the interests of poor, minority, and disadvantaged people in our nation.

Dēmos

Dēmos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. Dēmos deploys original research, advocacy, litigation and strategic communications to reduce both political and economic inequality to create the America the people deserve. Dēmos believes student body diversity in higher education is indispensable in preparing students to become civic leaders and to prepare them to meet the challenges of a multi-cultural workforce in an increasingly global economy.

League of United Latin American Citizens (LULAC)

The League of United Latin American Citizens (LULAC) is the largest and oldest Hispanic membership organization in the United States. With over 132,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans. For more than 83 years, LULAC's members have sought increased opportunities in higher education for Hispanic students through the desegregation of public schools, reaching parity in school funding, the provision of scholarships, educational counseling, and strong affirmative action programs.

League of Women Voters of the United States

The League of Women Voters of the United States is a nonpartisan, community-based organization that

encourages the informed and active participation of citizens in government and public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in over 750 communities and in every state, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, and that assures opportunities for citizen participation in government decision-making. To further this goal, the League has fought since its inception to ensure that every citizen can fully and productively participate in American society, from the school room to the ballot box. The League has long supported access to public education that provides equal opportunity for all.

National Action Network (NAN)

The National Action Network (NAN), founded in 1991 by Reverend Al Sharpton, works within the spirit and tradition of Dr. Martin Luther King, Jr. to promote a modern civil rights agenda. NAN believes this effort is incomplete without working to ensure the equality of opportunities in education through the support of admissions policies designed to promote diversity in the nation's colleges and universities.

National Association of Social Workers (NASW)

The National Association of Social Workers (NASW), established in 1955, is the largest association of professional social workers in the

United States with over 130,000 members in 55 chapters. The Texas Chapter of NASW has 6000 members. NASW develops policy statements on issues of importance to the social work profession including a Policy Statement on Affirmative Action which supports deliberate steps taken to attain a national consensus that values, respects and accepts multicultural and racial diversity and supports opportunities for access to employment, housing, and education.

National Council of Jewish Women (NCJW)

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms.

National Council of La Raza (NCLR)

The National Council of La Raza (NCLR) is the largest national Hispanic civil rights and advocacy organization in the United States. Through its network of nearly 300 affiliates, NCLR works to advance an equity agenda in the P-20 education pipeline.

National Immigration Law Center (NILC)

The National Immigration Law Center (NILC) is a leading public interest organization dedicated to protecting and promoting the rights of low income

immigrants and their family members. Since its establishment in 1979, NILC has earned a reputation as a leading expert on immigration, public benefits, and employment laws affecting immigrants and refugees. One of NILC's central goals has been to improve access to post-secondary education for immigrant students.

The National LGBTQ Task Force (Task Force)

The National LGBTQ Task Force (Task Force), since 1973, has worked to build power, take action, and create change to achieve freedom and justice for lesbian, gay, bisexual and transgender people and their families. As a progressive social justice organization, the Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all. We unequivocally support institutions of higher learning that value diversity and talent in the classroom. Furthermore, we believe that promoting diversity, and through the experiences gained from diverse communities, we can build a more understanding and accepting society.

New Leaders

New Leaders is a national nonprofit with a mission to ensure high academic achievement for all children, especially students in poverty and students of color, by developing transformational school leaders and advancing the policies and practices that allow great leaders to succeed. New Leaders aims to ensure educational excellence and equity in America

and to prepare all students for success in college, careers, and citizenship.

New York Appleseed

New York Appleseed advocates for solutions to racial and economic segregation in New York City public schools and across New York State.

Teach For America

Teach for America's mission is to enlist, develop and mobilize a diverse group of our nation's most promising future leaders to grow and strengthen the movement for educational equity. As one of our nation's leading recruiters of teachers of color for public schools, Teach For America has an interest in the maintenance of a national higher education system that produces talented, diverse graduates.